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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

JAMES R. HOFFA, BENJAMIN DRANOW, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, CALVIN KOVENS, AND SAMUEL HYMAN, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

See Inside Cover for Counsel

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REPLY BRIEF FOR PETITIONERS

The Brief for the United States in Opposition (pp. 64-73) concedes electronic eavesdropping by the Government on a conversation relevant to the defense at trial and the facts of the case. The Government's concession raises, for the first time, an issue of the relief to be granted Petitioners because of the Government's eavesdropping. That issue we discuss at this point.

The F.B.I. secretly installed and maintained a microphone in the Miami office of Benjamin Sigelbaum for about two years and a half from January 1963 until July 1965. During that two and a half year period,

the F.B.I., six months after indictment in this case, overheard and recorded a conversation between Sigelbaum and Petitioner Burris. All of the conversation related to this case, and particularly to the reorganization of Sun Valley, Inc. (Br. in Op. 64-65). The reorganization of Sun Valley, Inc., was, as the Government urged and the Court below found, the common object connecting all Petitioners to the alleged scheme and conspiracy on which they were convicted.

Petitioner Burris and Sigelbaum were both key figures in the reorganization of Sun Valley, Inc. It was Petitioner Burris who initiated and pushed the project of reorganizing Sun Valley, Inc., by raising necessary capital to pay off its creditors, get it out of bankruptcy, and acquire its ownership. Petitioner Burris and Petitioner Dranow interested Sigelbaum in the project. Sigelbaum contributed substantial capital to the project, and induced others to do the same, for a total of almost half of the required capital. One of the persons brought into the project was Edwin Willis. At the trial, Willis was a Government witness against all Petitioners. (II D.A. 1404, 1405; III D.A. 1873-74; 1884). Petitioner Burris was connected with almost all of the allegedly fraudulent Pension Fund loans charged by the Government. In proof of the essential common object of Sun Valley reorganization, the Government's principal contention at trial was that $100,000 paid to Petitioner Burris (and Petitioner Dranow) for services on Pension Fund loans went into the reorganization of Sun Valley, Inc.

In these particular factual circumstances, all Petitioners would be materially affected by the Government's secret intrusion on any conversation between

Petitioner Burris and Sigelbaum which related to the Sun Valley reorganization and the defense of Petitioner Burris. The particular Burris-Sigelbaum conversation, admittedly overheard by the Government, proves the point. According to the Government's own admissions, the conversation included the following (Br. in Op. 64-65):

1. "Burris discussed his personal financial problems and the possible transfer of his ten percent interest in Sun Valley, Inc., to Sigelbaum." So the Government learned of financial pressure on Petitioner Burris which, as the Government chose, it could discard or use at trial in showing motivation for Petitioner Burris to promote the alleged scheme and conspiracy. Either choice by the Government would affect all Petitioners.

2. "Burris told Sigelbaum that he (Burris) had paid for his interest in Sun Valley by borrowing $57,000 from Irving Kipnis, which he later repaid from a fee given him by Kipnis." The fee in question was for the services of Petitioner Burris on the Causeway Inn loan, one of the Pension Fund loans charged in the indictment as contributing to the common object of reorganizing Sun Valley. The Government says that it knew from independent sources of the Kipnis loan and its repayment. Apparently, the Government did not know from independent sources that the $57,000 contributed by Petitioner Burris to the Sun Valley reorganization was eventually funded from a Pension Fund loan. In any event, the Government obtained by the private admission of Petitioner Burris, confirmation of its information and trial theory on the Burris-Kipnis-Sun Valley reorganization link. This litigating advantage, derived from the Burris-Sigel-

baum conversation overheard by the Government after indictment and without observance of rights to counsel and to remain mute, disadvantaged all Petitioners at trial.

3. In answer to a question from Sigelbaum, Burris replied that "the Government would be unable to prove conspiracy" in this case. So, six months after indictment, the Government learned from the lips of Petitioner Burris, who would surely be in communication with his co-petitioners, that the defense of all Petitioners at trial would rest heavily, as it did, on the lack of a conspiracy amongst them.

4. "Sigelbaum named an individual who had experienced difficulty in obtaining a Pension Fund loan and suggested he might be a good defense witness." Any possible witnesses in respect to the Pension Fund would be relevant to the defense at trial of all Petitioners, for the conspiracy and scheme charged was to secure Pension Fund loans by fraud and use part of the proceeds to reorganize Sun Valley. Entirely apart from the name of a possible witness, the Government could readily deduce from this aspect of the conversation that part of the defense would be rejection by the Pension Fund of loan applications made by persons as close to Petitioner Hoffa as any of the Petitioners. And

5. "Sigelbaum asked about petitioner Hyman and was told by Burris that Hyman had spent the money he had borrowed from the Pension Fund on his projects, albeit not for precisely the items for which he had applied." This admission of Petitioner Burris, as to the Pension Fund loans made to Petitioner Hyman, surely guided the Government in the preparation

of its case on fraud in the obtaining of Pension Fund loans. This prejudiced all Petitioners, for they were all charged and convicted on a finding of one scheme and conspiracy to get Pension Fund loans by fraud and reorganize Sun Valley with funds from loan proceeds.

In fine, the Government intruded on a conversation pertinent to the trial defense of all Petitioners. From that unconstitutional intrusion on a common defense, the Government's prosecuting attorneys, who were fully informed of the conversation (Br. in Op. 65), got litigating advantages and information in prejudice to all Petitioners. Hence the Court's remedy for the Government's intrusion should be one for all Petitioners, and not just for Petitioner Burris, as the Government urges.

And that remedy should be new trial, and not just, as the Government concedes (Br. in Op. 73), the granting of certiorari and remand to the District Court for hearing on the results of the Government's intrusion. Here we rely on *Black* v. *United States,* 385 U.S. 961, and *O'Brien* v. *United States,* No. 823, this Term, decided March 20, 1967. In both of those cases, the Court granted a new trial because of the Government's eavesdropping on conversations between defendant and counsel in his case on matters related to his case. In each of those cases, the content of the conversations overheard by the Government was immaterial to the Court, for in *Black* such content was not revealed and in *O'Brien* such content (the limits of bail-bond) was irrelevant to the defense. In both cases, the close nexus ordinarily existing among defendants, defense counsel, and the defense apparently led to a conclusive presumption of Governmental intrusion on the defense, requiring a new trial, whenever the Government un-

constitutionally listens in on any conversation between defendant and his counsel.[1]

However, the *Black-O'Brien* doctrine of new trial for unconstitutional Government intrusion on the defense in a criminal case is not a mechanical rule of thumb to be applied solely to defendant-defense counsel conversations. Defenses in criminal cases are not prepared merely in consultations with counsel. The constitutional right to the making of a defense free of Governmental intrusion includes the very type of defense activities overheard by the Government in this case—the name of a possible defense witness, discussion of a line of defense, discussion of the weakness of the Government's case (inability to prove conspiracy), and discussion of the weakness of the defense's case (the money contributed by Petitioner Burris could be argued to be from money derived by Kipnis from a Pension Fund loan; and Petitioner Hyman did not expend his Pension Fund loans precisely on the objects specified to the Pension Fund). That the discussion was with a friend seeking to help the defense, and not with counsel, is immaterial. Here, unlike *Black* and *O'Brien*, there is no need to assume Governmental intrusion on a criminal defense from the fact of overhearing a defendant-counsel conversation. Here, the conversation unconstitutionally overheard by the Government did, as the Government begrudgingly admits (Br. in Op. 65, 66, 69, 70, 72), and as its

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[1] The Court's denial of certiorari in *Gronello* v. *United States*, No. 750, this Term, is not relevant to any issue here. There, the Government listened in on a conversation between a defendant in No. 750 and his counsel in two other totally unconnected cases, and the conversation, far from involving the defense in No. 750, did not relate to that case at all.

admitted content plainly shows, concern the defense of all Petitioners.

Application of the *Black-O'Brien* remedy of new trial to the facts of this case does not involve formulation of an inflexible rule of new trial for all cases of unconstitutional eavesdropping by the Government. On the contrary, it would be an inflexible and senseless rule to grant new trial in cases where the Government's intrusion on the defense is assumed from the sole fact of its overheading a defendant-defense counsel conversation, and to deny new trial in this case where the Government's intrusion on the defense is clearly exhibited by the very content of the conversation it overheard.

Since the Government, in violation of the Constitution, did intrude on a conversation pertinent to defense of all Petitioners, with litigating advantage to the Government and prejudice to Petitioners (whether or not any Government evidence used at trial can be traced to the conversation) all Petitioners should be granted a new trial.

On the points raised in our Petition, we make the following reply, which we believe is all that is necessary, to the Government's Brief in Opposition. We use the same roman numerals and headings as in the Petition.

I. Multiple Schemes and Conspiracies, and Irrelevant Transactions Prosecuted as One Single Scheme and Conspiracy to Defraud

The convictions of Petitioners rested on a finding of a single scheme and conspiracy to obtain Pension Fund loans by fraud for use of part of the proceeds

in the reorganization of Sun Valley. Relevance to such a single scheme and conspiracy requires that any loan relied on by the Government be both obtained by fraud and a source of funds for the Sun Valley reorganization.[2] So much is indisputable.

Yet, the Government does not deny, and, indeed, a close reading of its Brief in Opposition confirms that the Government introduced evidence on many Pension Fund loans without any attempt to fulfill the two requisites of the single scheme and conspiracy charged—fraud on the Pension Fund and use of loan proceeds for the Sun Valley reorganization. The Government failed to fulfill the fraud requirement on the first Everglades, first Fontainebleau, first Key West, and Causeway Inn loans. It failed to fulfill the requirement of a Sun Valley connection on the 4306 Duncan Corp., third Fontainebleau, Good Samaritan Hospital, Casa Marina, La Concha, second Key West, second Everglades and second First Berkeley loans. It failed to fulfill either requirement on the Miracle Plaza, Miami International Airport, Birmingham Airport Motel, Club 300, Causeway Inn, first and third First Berkeley, and fourth Fontainebleau loans. None of this is actually disputed, for, as to all of the foregoing loans, the Government still ignores fulfillment of the two requirements of the single scheme and conspiracy charged, and substitutes instead, as it did at trial, the association of some of the Petitioners in some of the loans, and, without consideration of relevance, as much prejudicial "dirt" as it can dig up on payment of

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[2] These two requirements go to all counts, substantive as well as conspiracy, for all counts alleged the same scheme and conspiracy. (See Pet. App. A, p. 47a)

finders fees for Pension Fund loans. For detail compare Pet. 10-16 with Br. in Op. 10-33.

The short of the matter is that *nineteen* of the twenty-one loans proven by the Government in attempted support of the single scheme and conspiracy charged had nothing to do with the case. So all of the petitioners were subjected to the prejudice and perils of a mass trial although their conduct did not invite mass trial—all in contradiction of *Kotteakos* v. *United States,* 328 U.S. 750, and other decisions of this Court and of Circuit Courts of Appeal cited in our Petition, pp. 56-61.

II. Communications from Trial Judge to Deliberating Jury in Absence of All Petitioners and Their Counsel

The Government neither admits nor denies that the communications among the marshal, the trial judge and the jury violated petitioners' Sixth Amendment rights. Instead, the Government erroneously attempts to limit this issue to one where the trial judge simply permitted the jury to see the indictment. Petitioners do not contend that a trial judge does not have discretion to send an indictment to a jury under proper conditions and safeguards. The issue is whether a trial judge in response to an ambiguous jury communication may send an indictment to and otherwise communicate with a deliberating jury in the absence of petitioners and their counsel. May the convictions here stand where there has been no showing that such communications were not prejudicial and where, in fact, petitioners were denied the opportunity to request the Court to strike prejudicial matters contained in the indictment and to ascertain the nature of the jury's apparent confusion?

The factual background stated by the Government is so inaccurate as not to relate at all to the problem presented. First, the objection by petitioners to proposed verdict forms, which would have overemphasized portions of the evidence by aligning a particular count with a particular loan transaction (G.A. 200-201), did not and does not relate to whether the entire indictment should have been sent to the jury.[3] Furthermore, after requesting a suggestion "as to how the jury can identify counts," the trial judge was satisfied with petitioners' objections stated above. (G.A. 201)

Second, the trial judge's decision to reject the proposed Government instructions summarizing the indictment was made after a defense objection that such instruction argumentatively presented the Government's theory of its case. (G.A. 210-212) His decision to read portions of the indictment to the jury, in lieu of the refused Government instruction, was made after petitioners agreed that the indictment, minus those allegations on which there was no evidence, be read to the jury. (G.A. 212) Following a lengthy colloquy, during which petitioners pointed out, and the Government agreed, that the indictment alleged matters that had not been proved or concerned matters which the Court had rejected as prejudicial (Tr. 15 293-15,294; G.A. 212-215), the judge at first said he was going to read the entire indictment to the jury. (G.A. 219) Subsequently, however, the trial judge concurred with petitioners and omitted from his charge all reference to the stricken counts and the allegations referring to the monitors' proceeding. (See Count One, para. 4(c);

[3] The indictment could not have accomplished what the trial judge seemingly intended because each count of the indictment incorporated by reference all allegations concerning all loan transactions.

I D.A. 44; III D.A. 2113-2132) Thus, the admonishment to the jury not to consider the indictment as evidence did not relate to the objectionable portions of the indictment which the Court had omitted altogether. At the time the indictment was delivered to the jury, no cautionary instructions were given.

Third, the Government mistakenly states that Marshal Miller testified "that he had said nothing to the jurors when he handed the . . . indictment into the jury room." (Br. in Op. 41) There is no doubt that Miller repeated the trial judge's verbal instruction "this is all that they [jury] are going to get," when he delivered the indictment to the jury.[4]

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[4] According to the Government (Br. in Op., p. 41), "the bailiff testified that he complied with the court's directive (III A. 2180, 2234) and, in response to a more precise question, that he had said nothing to the jurors when he handed the copy of the indictment into the jury room (III A. 2232)." According to the facts of record, the bailiff on July 28, 1964, on questioning by the trial judge testified (III D.A. 2180):

> "Q. And you were advised by me to deliver this to the jury and tell them that pursuant to their request they could have this and nothing more?
>
> "A. That is correct.
>
> "Q. And pursuant to that you did deliver the indictment to them and you also told them this is all that they are going to get?
>
> "A. This is true, yes, sir."

Thereafter, on August 17, 1964, the bailiff, at first testified (III D.A. 2232):

> "Q. And you made no statement to them as you gave it to them?
>
> "A. No, sir."

But when shown his testimony of July 28, 1964, as quoted above, the bailiff testified (III D.A. 2234):

> "Now, does that refresh your recollection that there was conversation?
>
> "A. Yes, this is accurate."

The Government fails to answer petitioners' contention that prejudice must be presumed in the instant Sixth Amendment violations, or that the record must clearly negate prejudice beyond all reasonable doubt. See *Chapman* v. *California*, 87 S.Ct. 824. The Government merely asserts that factually the petitioners were not prejudiced. (Br. in Op. 42-43) In so doing, it misstates the extent of the evidence available to the jury concerning the monitors' proceedings. The Government's record references do not support the claim that "there was substantial evidence before the jury that the deposit in the Florida bank had been questioned by a Senate committee and by a Florida grand jury." (Br. in Op. 8, 42) At most, the jury learned that petitioner Hoffa testified previously before a Senate committee concerning the deposit of funds by Local 299 in the Florida National Bank. (I D.A. 1467-1469) Possession of this scant knowledge did not render harmless the further advice that a Board of Monitors appointed by a United States District Court was inquiring into the deposit as a breach of Hoffa's fiduciary duties. The prejudice from the further advice was aggravated by the erroneous instruction that one using a position of trust to obtain benefits is performing an active fraud. (See Pet. p. 83)

The Government attempts to distinguish *Grosso* v. *United States*, No. 181, this Term; *Shields* v. *United States*, 273 U.S. 583, and other decisions cited by petitioners on the basis that the instant case does not involve communications which would affect the jury's deliberations. This distinction is factually incorrect and legally insufficient. Factually, the Government's distinction depends upon the premise that "the jury asked no questions of law whatsoever" and requested

merely the indictment. (Br. in Op. 43) But, the jury, in addition to requesting a "document of all counts" and a "document of overt acts named," also requested a "document of *law* on all counts." (Emphasis added, III D.A. 2179-2180; Br. in Op. 41) Even the majority of the Court of Appeals regarded this request as "ambiguous as to what specific information the jury desired." (Pet., App. A, p. 24a; see also dissent, p. 42a) Thus, it appears the jury was requesting aid from the trial judge in addition to the indictment, to enable them to conduct their deliberations.

The trial judge's directive to the jury that they would receive "nothing more" from him and his concurrent failure to call the jury into open court, ascertain the nature of their confusion, resolve the ambiguity in their communication and instruct them accordingly, deprived the jury of the aid to which it was entitled. *Bollenbach* v. *United States*, 326 U.S. 607, 612-613.

III. Receipt by Jurors During Trial of Prejudicial Newspaper Statements

The Government states flatly that the newspaper article shown by the jury foreman to the alternate juror Paré "did not acquaint the jury with anything which they did not know as a result of the trial." (Br. in Op. 45) This statement is simply untrue. Juror Gogarty, and any other juror seeing the article, learned that: (1) the Judge had rejected two motions for judgment of acquittal; (2) in so doing, the Judge had rejected a contention of Petitioner Hoffa's innocence and good faith; and (3) the highly prejudicial, but inaccurate information that Petitioner Dranow in the Dranow-Link letters had stated that he "would take

the blame" and had "asked for a $60-a-day payoff from co-defendants." See the newspaper article, quoted in full at Pet. 21-22.

Respectfully submitted,

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